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Supreme Court, U.S.
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No. 96-78

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARSHALL SPIEGEL,

Petitioners,

v.

STATE FARM FIRE AND CASUALTY CO.,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. RESPONDENT'S REQUEST FOR SANCTIONS SHOULD BE DENIED BECAUSE RESPONDENT HAS DELIBERATELY DISTORTED THE RECORD IN THE CASE AT BAR.

Given the clumsy sleight-of-hand Respondent attempts to pass off in its Brief In Opposition, Respondent's request for "just damages" and double costs from the *pro se* Petitioner reeks with hypocrisy. (Brief In Opposition at 10). Any alleged sins of the *pro se* Petitioner pale in comparison to Respondent's blatant misrepresentations regarding the holding of the court below, misinformation concerning the contents of the insurance policy at issue and distortions of the arguments concerning double jeopardy. Respondent's Brief is a gross violation of Supreme Court Rule 15.1 because it does not assist this "Court in the exercise of its discretionary jurisdiction". Instead it hinders that objective by distorting the facts and muddying the issues.

The Opinion

By far the most egregious example of Respondent's misconduct is its repeated misrepresentations regarding the holding of the Illinois Appellate Court. Respondent states:

> The Illinois appellate court correctly ruled that the State Farm policy did not provide coverage for the criminal complaint against Spiegel because the criminal complaint was not an action for damages . . . Monetary penalties in a criminal case are not "damages" but are penal in nature. See, *Shelter Mutual Insurance Co. v. Bailey*, 160 Ill App. 3d 146, 513 N.E. 2d 490 (1987). The Illinois appellate court in this case followed *Shelter*, which is directly on point, and held that State Farm did not have a duty to defend Spiegel against the criminal complaint.

(Brief In Opposition at 4-5).

This is simply not true. Even a cursory examination of the Appellate Court opinion reveals that the Appellate Court did not follow *Shelter*, did not hold that monetary penalties in a criminal case are not "damages," and did not hold that Respondent did not have a duty to defend. Instead, the opinion of the Appellate Court states: "We *do not address the issue* of whether restitution [in a criminal case] constitutes damages under plaintiff's insurance policy with State Farm." (Petition for Writ of Certiorari at A4). (Emphasis added).

Contrary to Respondent's representations, *Shelter* is not at all on point. First, *Shelter* did not even involve restitution. Second, *Shelter* found that the policy in that case excluded assault and battery through an exclusionary clause. 513 N.E. 2d at 497-98. Unlike the policy in the case at bar, the insurance policy in *Shelter* did not have language specifically providing for insurance coverage for battery. The policy in this case specifically includes battery in its coverage, as Respondent concedes. (Brief In Opposition at 7).

The Policy

After intentionally mangling the Appellate Court opinion, Respondent proceeds to distort the contents of the policy. While Respondent concedes that the "policy grants coverage for . . . battery," it inserts the words "intentional torts." (*Id.* at 7). Nowhere does the policy restrict coverage to "intentional torts": it simply covers battery, the latter being the charge against Petitioner. Moreover, nowhere does the policy exclude coverage for a crime, again contrary to Respondent's assertion. (*Id.* at 8).

Nor is it against public policy in Illinois for an insurance company to defend or indemnify against criminal

acts, as Respondent argues. In *Dixon Distrib. Co., v. Hanover Ins. Co.*, 244 Ill. App. 3d 837, 612 N.E.2d 846 (1993) the Appellate Court carefully analyzed a contention similar to Respondent's, and held that public policy does not prohibit insurance companies from defending against intentional torts which constitute crimes. The Court noted that the determination of public policy is a "function of the legislature, not the courts," and there was no statute or legislative directive prohibiting insurance indemnification for intentional torts. 612 N.E. 2d at 852. In addition, the Court reasoned, the case law was replete with examples of insurance policies that were written to indemnify against the consequences of injuries inflicted intentionally or even willfully by the insured. Public policy is not offended by an innocent party attempting to protect himself against the high cost of litigation merely because the charge is of an intentional act, the Court held. The better side of the public policy argument favors coverage of the costs of defense, the Court concluded. *Id.*

The Petition

Respondent argues:

> Spiegel suggests that existing precedent and the appellate court's ruling are incorrect because there is the "possibility" that he could have been ordered to pay restitution by a sentencing judge. Spiegel argues that an order for restitution would constitute "damages" thereby requiring State Farm to defend him in the criminal action. As an initial matter, Spiegel did *not* provide a copy of the criminal complaint to State Farm when requesting coverage nor did he attach a copy of the criminal complaint to his complaint against State Farm. Further, Spiegel did not present any evidence that restitution was sought in the crim-

> inal case . . . Spiegel's suggestions as to what was sought in the criminal complaint or how the court might have fixed his punishment had he been convicted are merely hypotheticals which in no way trigger coverage under the State Farm policy.

(Brief In Opposition at 5). (Emphasis in original).

This is the most specious argument of all. First, Petitioner did not suggest, and Respondent provides no citation for its alleged quotation, that restitution was only a "possibility" in his case. It was mandatory upon conviction because it is undisputed that Petitioner was charged with battery against a person over the age of 65. The applicable Illinois statute, 730 ILCS 5/5-5-6, mandates an order of restitution upon conviction of that offense. That statute states in relevant part: "In all convictions for offenses in violation of the Criminal Code of 1961 committed against any person 65 years of age or older in which the person received any injury to their (*sic*) person . . . the court *shall* order restitution as provided in this Section." (Emphasis added). (Appendix to Reply Brief at A1-A2). The Appellate Court was required to take judicial notice of this statute. 735 ILCS 5/8-1003 ("Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United Sates."). (Appendix to Reply Brief at A3). *See also*, *Rockford v. Gill*, 60 Ill. App. 3d 194, 376 N.E. 2d 420 (1978). In fact, the concurring opinion quotes the relevant portion of the restitution statute. (Petition at A4). Thus Petitioner did present evidence that restitution was an absolute certainty upon conviction, not a mere possibility or a hypothetical.

Respondent's remarks about the contents of the criminal complaint and the failure to provide a copy are equally spurious. The applicable Illinois statute, 725

ILCS 5/111-3(a), provides that a criminal complaint need only allege the name of the offense, its nature and elements, the date and county in which it took place, and the name of the accused along with a citation to the statutory provision. (Appendix to Reply Brief at A4). *See also, People v. Johnson*, 252 Ill. App. 3d 609, 626 N.E. 2d 230 (1993). For this reason it is axiomatic that criminal complaints, even in death penalty cases, *never* specify the punishment sought. Respondent (and the Appellate Court) are charged with such knowledge. Once again, the Appellate Court was required to take judicial notice of this statute pursuant to 735 ILCS 5/8-1003. The failure of Petitioner to provide Respondent with a copy of the complaint is a pure red herring because Respondent did not decline coverage based upon this provision. (*See*, Appendix to Reply Brief at A5 -A9: letter dated September 3, 1993, from State Farm Insurance Companies to Marshall C. and Carol Spiegel.).

Finally, an order of restitution would constitute "damages" resulting from inflicting personal injury within the meaning of the policy, thereby triggering coverage. Respondent fails to mention that Illinois law defines "restitution" as the "actual out-of-pocket expenses, losses, *damages*, and injuries suffered by the victim. . ." 730 ILCS §5/5-5-6(b). (Emphasis added).

The similarity of criminal restitution to civil damages is discussed in *People v. Mitchell*, 241 Ill. App. 3d 1094, 610 N.E.2d 794, 797 (4th Dist. 1993). The court stated: "We conclude that section 5-5-6 of the Code basically allows for a court order which at least partially substitutes for civil relief in favor of the injured party or parties."

Similarly, in *People v. Nasser*, 223 Ill. App. 3d 400, 410, 584 N.E. 2d 1010, 1016 (1991) the court held that

the legislature intended the restitution provisions to be a vehicle for a victim to recover monetary damages from the assailant. The court stated, "we believe trial courts have a duty to the extent possible, to order restitution to benefit victims so that they can avoid the bother, expense, and delay too often present in the civil justice system. This duty is mandated by the legislative intent underlying section 5-5-6 of the Code (Ill. Rev. Stat. 1989, ch. 38, par. 1005-5-6). The focus of concern for the courts ought to be that victims of crime, who have been forced to endure the suffering, inconvenience, and hardship frequently associated with that status, receive remuneration for the damages they have suffered." Interestingly, the Court in *Nasser* specifically noted its disagreement with the California case law cited by Respondent. (Brief In Opposition at 7). The Illinois Court held in *Nasser* that providing a victim with an inexpensive and expeditious alternative to the civil justice system for the collection of damages was the legislative intent in enacting the restitution provisions of the Illinois Criminal Code.

In *Benedick v. Mohr*, 233 Ill. App. 3d 903, 600 N.E. 2d 63 (5th Dist. 1992) the Court held that an order of restitution had a collateral estoppel effect on the issue of damages in a subsequent civil case brought on the facts underlying the criminal complaint. The Court stated, "[w]e see no reason to force plaintiff to go through the expense of a trial so that defendant can attempt to obtain *an inconsistent judgment* from another trier of fact or to escape her obligation to reimburse [plaintiff] fully for the money she has stolen. Defendant has had her day in court and she is *precluded from relitigating the same factual issue over and over*." 600 N.E. 2d at 68. (emphasis added).

In conclusion, it is unconscionable that members of the bar, such as Respondent's counsel, would deliberately distort the opinion and the record as they have done in the case at bar. Because Respondent comes before this Court with such "unclean hands", for this reason alone its request for sanctions should be denied.

II. THE DOUBLE JEOPARDY ARGUMENT PROFFERED BY THE PRO SE PETITIONER IS NOT FRIVOLOUS AND DOES NOT WARRANT THE IMPOSITION OF SANCTIONS.

Treating the case for the moment as does the Petition and Respondent's Brief in Opposition, it is apparent that a colorable double jeopardy issue is presented.[1]

The concurring opinion states:

> I believe it demonstrates a legislative intent to make restitution a penalty for the commission of a criminal offense and not merely a substitute for civil damages . . . restitution in the context of the above language connotes a penalty or punishment for a criminal offense. . .

The Petition, citing *Benedick v. Mohr*, *supra*, 600 N.E. 2d at 68, notes that "an order of restitution triggers the doctrine of collateral estoppel regarding the issue of damages in a subsequent civil case brought on the facts underlying the criminal complaint." (Petition at 4). This, of course, is an important component of the protection

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[1] Respondent is correct in stating that the *pro se* Petitioner failed to comply with Supreme Court Rule 24(f) because he failed to set out verbatim the double jeopardy clause of the Fifth Amendment (". . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . .). However, Petitioner quite clearly identified double jeopardy as the constitutional basis of the Petition. (Petition at 3-5).

against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436 (1970).

The Petition proceeds to argue that:

> If restitution is exclusively penal in nature, then the subsequent suit for restitutionary damages could be alleged to be a second punishment for the same offense. This result would be in conflict with this Court's recent holding that civil forfeitures do not constitute punishment for purposes of the double jeopardy clause. *United States v. Ursery*, No. 95-345 (June 24, 1996).

(Petition at 5).

This argument is not as far-fetched as the rebuttal proffered by Respondent. Respondent first states that *Ursery* "held that civil *in rem* forfeitures were not punishment for purposes of the double jeopardy clause." (Brief in Opposition at 8). Actually, *Ursery* is not that broad because it did not hold that *all* civil *in rem* forfeitures were not punishment: "These civil forfeitures (and civil forfeitures generally), we hold, do not constitute 'punishment' for purposes of the Double Jeopardy Clause." *United States v. Ursery*, ___ U.S. ____, 116 S. Ct. 2135, 2138 (1996). Later the Court stated:

> That a forfeiture is designated as civil by Congress and proceeds *in rem* establishes a presumption that it is not subject to double jeopardy. Nevertheless, where the "clearest proof" indicates that an *in rem* civil forfeiture is "so punitive either in purpose or effect" as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause.

Id. at 2148 n. 3. (citations omitted).

Respondent then argues that double jeopardy does not apply because "[t]here has only been one criminal charge

filed against Spiegel," and therefore his "argument is entirely hypothetical. . ." (Brief in Opposition at 8). Apparently Respondent is unaware that double jeopardy protects not only against multiple convictions and punishments, but also against multiple prosecutions, for the same offense. *United States v. Dixon*, 509 U.S. 688, 696 (1993). This is the reason that, contrary to the general rule, a defendant is permitted to appeal the denial of a colorable double jeopardy motion prior to trial. *Abney v. United States*, 431 U.S. 651 (1977). Double jeopardy protects against the ordeal, time, and expense of going through the second trial. Thus, contrary to Respondent's argument, the fact that Petitioner was not actually subjected to two trials does nothing to undermine his double jeopardy argument.

Respondent also maintains that a civil suit can never trigger double jeopardy protection. (Brief in Opposition at 9). Respondent, who cites no double jeopardy caselaw other than *Ursery*, has obviously never heard of this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989). *Halper* made quite clear the fact that the labels "civil" and "criminal" do not control for purposes of double jeopardy analysis. 490 U.S. at 447. *See also, Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ____, 114 S. Ct. 1937, 1948 (1994) (Drug tax statute enforced in civil proceeding may be characterized as punishment for purposes of double jeopardy clause); *Austin v. United States*, 509 U.S. 602 (1993) (Civil forfeiture subject to limitations of excessive fines clause of Eighth Amendment). Thus, contrary to Respondent's contention, a civil action can trigger double jeopardy protection.

If the state seeks multiple punishments in a single proceeding, the concerns underlying the Double Jeopardy Clause are not implicated, and the only inquiry is

"whether the legislature actually authorized the cumulative punishment."[2] In contrast, where the state seeks multiple punishments in multiple proceedings, the Double Jeopardy Clause ensures that the state will neither use multiple proceedings to harass or exhaust particular defendants,[3] nor seek "a second punishment when it is dissatisfied with the punishment levied in the first action."[4]

In the case at bar if restitution as defined by the Illinois statute is exclusively punishment, then double jeopardy would be implicated under the following scenario. In a criminal prosecution the defendant is convicted and sentenced to prison. In a subsequent civil suit by the state seeking damages, the defendant raises the bar to double jeopardy because the damages are the same as restitution, which constitutes punishment. The defendant argues that the prosecution is seeking multiple punishments in multiple proceedings. Moreover, to the extent that restitution equates with civil forfeiture, the concurring opinion in the court below arguably conflicts with *Ursery*.

CONCLUSION

For the reasons set forth above, Respondent's request for an award of just damages and double costs pursuant to Rules 42 and 43 should be denied, and Petitioner prays that the Petition is granted.

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[2] *Halper*, 490 U.S. at 4511 n. 10.

[3] *Abbate v. United States*, 359 U.S. 187, 198-99 (1959) (opinion of Brennan, J.); *United States v. P.H.E., Inc.*, 965 F.2d 848, 850-53 (10th Cir. 1992).

[4] *Halper*, 490 U.S. at 451 n. 10.

Respectfully submitted,

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